UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INLAND WATERS POLLUTION CONTROL, INC.

and **Case 07-CA-277239**

SHINAR E. REED, An Individual

and **Case 07-CA-279287**

QUAMAAR HAASHIIM, An Individual

Rana Roumayah, Esq.,
for the General Counsel
Brian M. Schwartz, Ahmad Chehab, and James Parks, Esqs.
for the Respondent

DECISION

INTRODUCTION[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. These cases were tried on April 11-12, 2022, in Detroit, Michigan, over allegations that Inland Waters Pollution Control, Inc. ("Respondent" or "IWPC") violated Section 8(a)(1) and (3) of the National Labor Relations Act ("Act").

In December 2020, Respondent and Local 247, International Brotherhood of Teamsters ("Union") began negotiations over a successor collective-bargaining agreement. Early in negotiations, Respondent proposed adding language to the agreement giving it the discretion to discipline or discharge employees for filing "baseless, malicious, or harassing" grievances. During a negotiation session, Respondent's attorney James Parks told chief Union steward Shinar Reed that his "excessive" grievance filing was "a problem" and to cut down on the "bullshit" grievances. Respondent eventually withdrew its proposal.

In March 2021, Respondent submitted its final contract offer to the Union. On April 25, the unit employees voted to reject that offer and to go out on strike. The following day, a group of unit employees, including Reed and Quammar Haashiim, began picketing outside the front gates to Respondent's Detroit facility. That same day, on April 26, Respondent sent the striking employees a letter threatening to replace them if they did not report for work the following day. Reed, who is African American, then sent a private text to a group of unit employees, most of whom are African American, with an image of Daffy Duck tap dancing on a stage wearing a straw hat, a red bow tie, and white gloves, with the typed message, "I beez at work tomorrow Thom. I beez a good boy for the company. Dem fools out front is crazy. Youz treats me right boss." "Thom" was a reference to Operations Manager Thomas Hamilton, who is Caucasian. On April 30, Respondent discharged Reed, stating the text violated the company's policies against racially offensive and harassing behavior.

[1] Abbreviations are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibits; "R. Exh." for Respondent's Exhibits. Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based on my review and consideration of the entire record and party submissions.

On May 5, Respondent sent Haashiim a letter informing him he was being "permanently replaced" in accordance with the company's April 26 letter. Haashiim had been off work since March 2020. Initially, he was granted consecutive leaves of absence. When his leave expired in September 2020, Respondent notified Haashiim he either needed to return to work, extend his medical leave, or resign. Haashiim never returned to work. For the next seven months, Haashiim unsuccessfully attempted to extend his medical leave and later to apply for disability benefits. Respondent contends it did not discover that Haashiim had not been formally discharged until after he participated in the strike.

The General Counsel's amended consolidated complaint alleges that Respondent discharged Reed and Haashiim because they assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, in violation of Section 8(a)(1) and (3) of the Act. It further alleges Respondent violated Section 8(a)(1) of the Act when Respondent, through Parks, threatened to discipline or discharge employees for their grievance filing activities. Respondent denies these allegations. As discussed below, I find Respondent committed the violations as alleged.

STATEMENT OF THE CASE

Reed filed the charge in Case 07-CA-277239 on May 14, 2021 and amended it on August 23, 2021. Haashiim filed the charge in Case 07-CA-279287 on July 1, 2021. On February 9, 2022, the Acting Regional Director, on behalf of the General Counsel, issued an order consolidating the cases and a consolidated complaint. On February 22, 2022, Respondent filed its answer denying these allegations and raising various affirmative defenses.[2] At the hearing, all parties were afforded the right to call and examine witnesses, present any relevant documentary evidence, and argue their respective legal positions. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT[3]

I. Jurisdiction

Respondent is a corporation with an office and place of business in Detroit, Michigan ("Detroit facility") where it has been engaged in the construction, service, and repair of piping. During the calendar year ending December 31, 2021, Respondent purchased and received at its Detroit facility goods valued in

[2] On June 1, 2021, Brandon Love filed a charge in Case 07-CA-277902 alleging he and another employee were replaced after they participated in the strike. Allegations from that charge were included in the consolidated complaint. On April 11, 2022, following the parties reaching a settlement, the Regional Director severed Case 07-CA-277902 and issued an amended consolidated complaint. The allegations from the two remaining cases were unchanged, as was Respondent's answer denying them. (GC Exh. 2)(Tr. 9-10).

[3] The Findings of Fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as in conflict with credited evidence or because it was incredible and unworthy of belief. In assessing credibility, I primarily relied upon witness demeanor. I also considered the context of the witness's testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), rev'd. on other grounds 340 U.S. 474 (1951)). Where necessary, specific credibility determinations are set forth below.

excess of $50,000 directly from outside the State of Michigan. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Respondent repairs and rehabilitates underground sewer lines from its Detroit facility. The Union represents about 70 full-time hourly employees, including crew leaders ("unit employees"). (Tr. 241). The most recent bargaining agreement is dated October 1, 2017, through September 30, 2020. (R. Exh. 19).

Haashiim and Reed, who are both African American, began working for Respondent in 2017. Haashiim initially worked as a driver/laborer, and then as an operator. Reed worked as a laborer. Unit employees often work underground and in confined spaces cleaning pipes and installing heavy cloth liners. They rely on one another to safely enter and exit these spaces, usually with lanyards and cords.

Theo Brooks is the Fleet Manager/Facility Manager. He is African American. Thomas Hamilton is the Operations Manager and Caucasian.

Respondent is a subsidiary of Inland Pipe Rehabilitation, LLC ("IPR"). Harvey Parker is IPR's Vice President of Human Resources (formerly Human Resources Director). Parker is Caucasian.

B. Respondent's Policies

Unit employees are covered under IPR/IWPC's employee handbook and uniform rules and regulations. (R. Exhs. 5 and 18). The rules state harassment of an employer, employee or customer, or any other act that could contribute to the creation of a hostile work environment, is grounds for immediate termination. The handbook states employees are expected to maintain a productive work environment that is free from harassing or disruptive activity, including, but not limited to, harassment based on race. The social media policy prohibits postings that include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct, which may result in discipline up to and including termination. The handbook states that "all complaints of harassment will be investigated promptly, and in as impartial and confidential a manner as possible. An investigation will include interviews of possible witnesses, including the person reporting the harassment that occurred, and the person or persons claimed to be involved in the harassment." (R. Exh. 18, pg. 32-33).

C. Reed's Role as Steward and December 2020 Contract Negotiations

In February 2020, Reed became the Union steward. In August, he was promoted to chief steward. From all accounts, Reed was active in both roles, particularly in filing grievances.[4] Theo Brooks estimated

[4] Reed also filed complaints with human resources. On September 24, 2020, Reed complained about an incident involving supervisor Gerry Schiewech, who is Caucasian. The day before, Reed, Schiewech, and another employee Sean Pippens, who is African American, were preparing to clean a sewer line. As Schiewech was giving instructions, he told Pippens that he would take pictures and "hang" Pippens if he didn't clean the line properly. Reed asked Pippens if he heard what Schiewech said. Pippens replied that Schiewech says stuff like that all the time. Schiewech interrupted by asking, "Are you really going to make a big deal out of me saying I would hang him?" Reed told Schiewech he can't talk to black men that way. Schiewech laughed. Reed later complained and human resources investigated the matter. They concluded that Schiewech displayed poor judgment when he used inappropriate, unprofessional language, but his comments were not racially motivated or designed to convey a threat of violence.

there was a 20-25 percent increase in grievances once Reed became a steward, the most Brooks had ever seen. (Tr. 348; 352-353). According to Brooks, not all those grievances alleged violations of the agreement, and some were filed after the matter was resolved or the party was no longer challenging the disciplinary action. Brooks believed these grievances "waste[d] everybody['s] time." (Tr. 347-348; 352-353).

In December 2020, Respondent and the Union met virtually to begin negotiations over a successor collective-bargaining agreement. They met on December 3 and 17. Reed was part of the Union's bargaining committee. Brooks and Respondent's attorney James Parks were part of Respondent's bargaining committee, as was Harvey Parker. At one of the December sessions, Respondent proposed adding language to the Arbitration & Grievance Procedure, which read in relevant part:

> At the employer's discretion, the employer may issue disciplinary actions against employees levying baseless, malicious or harassing grievances. These actions may include disciplinary steps of time off or termination for serious offenders.

(GC Exh. 3).

Brooks stated during bargaining that the language was necessary because the grievances were "just totally out of hand." (Tr. 347). Parks separately told Reed that his "excessive amount of grievances" was "a problem" and to cut down on the "bullshit grievances." (Tr. 43; 47).[5] Parks did not explain or provide any examples of what he meant. Respondent eventually withdrew the proposal by the end of the December 2020 bargaining sessions, and it was not discussed again.

D. Reed's Continued Activities

Reed continued to participate in negotiations and file grievances into early 2021. At the time, Reed worked under Operations Manager Thomas Hamilton. In April, Reed searched online and found Hamilton's personal Facebook page, which was visible to the public. It had a photo of Hamilton and a woman (who is Hamilton's wife) smiling with an image of the Confederate flag superimposed over them. Reed took a screenshot of the photo. On April 14, Reed texted the screen shot to Parker, Hamilton, and 10 unit employees, with the message:

> Gentlemen, there is no need to fear bigotry although racism is tolerated at IWPC. Currently, Tom Hamilton is trying to humiliate me by having me work at the shop basically doing nothing. It is evident that he can't stand strong minded black men. Don't let his attempt to use me as an example intimidate you guys. I'll be fine.

(GC Exh. 13, as supplemented by testimony (Tr. 79)).

Schiewech received "appropriate disciplinary action" and was reminded about the policy against inappropriate language in the workplace. (GC Exh. 11). The record does not reflect what the disciplinary action was.

Two months later, Union steward Phillip Earley, who is African American, approached Operations Manager Thomas Hamilton and complained about the workload, stating, "Hey, we're getting our butts beat on a jobsite. I think we need some other guys." Hamilton responded, "Is Jamie [the foreman] over there being a slave driver?" Hamilton immediately apologized to Earley. Earley later prepared a grievance over the incident, but he did not file it based on the company's response to the Schiewech incident. (Tr. 211-212)(GC Exh. 24).

[5] Reed's testimony, which I have credited, was corroborated by Earley, who was also present as a member of the Union's bargaining committee. (Tr. 203-204). Brooks and Parker testified about the proposal but not about Parks' statement. Parks, who was one of Respondent's three attorneys at the hearing, did not testify.

Reed also filed a grievance alleging Hamilton assigned him to work in the shop rather than the field in an attempt to intimidate him in his role as Union steward during a labor dispute. (R. Ex. 7).

The following day, Reed emailed Parker asking him to tell Hamilton not to refer to African Americans as "dark people" or "colored people." (GC Exh. 13). Parker later responded that he would formally investigate Reed's claim of disparate treatment based on race. Reed replied to Parker that he was not making a claim of disparate treatment, but rather speaking generally about how IRP/IWPC tolerates racism and behavior that is consistent with people who are racist or prejudiced. He also advised Parker about his grievance alleging discrimination based on his Union involvement. (GC Exh. 13).[6]

Parker met with Hamilton, who reported the Confederate flag photo was on his personal Facebook page and not something shared with the company. Hamilton was not disciplined for the photo.[7]

E. Decision to Strike and Respondent's Letter

In March 2021, Respondent submitted its final contract offer to the Union. On April 25, the Union held a meeting with the unit employees. Reed spoke at this meeting and was in favor of rejecting the offer and going out on strike to protest the company's economic proposals. A majority of the employees agreed and voted to reject the offer and to go out on strike, starting the following day.

On the morning of April 26, approximately 25 employees, including Reed and Haashiim, began picketing outside Respondent's front gates. Members of management passed through these gates and saw the picketers. (Tr. 166-167). The Union also provided Respondent with a letter identifying those employees who were participating in the strike. Later that morning, Respondent issued a letter threatening to replace those employees who failed to show up for work at the start of their regularly scheduled shift the following day. (GC Exh. 5). This letter went to those who did not show up to work on April 26, as well as those identified by the Union as being on the picket line. (Tr. 276). Reed and Haashiim both received a copy.

F. Group Texts

After work on the evening of April 26, Reed sent a private group text to 18 other unit employees on their personal cellphones.[8] (GC Exh. 10).[9] The group consisted of 16 African Americans, two Hispanics, and one Caucasian. Reed initially texted, "If anyone is having a change of heart for whatever reason, please let the rest of us know now. Don't flake out on us at the last minute tomorrow and cross the line." One employee responded, "Truth is there [sic.] not going to do anything they can't afford too [sic.] that's why they tried that email is a scare tactic Think fellas all you guys who are operators how can they replace y'all. Who do they have to replace y'all they begging guys to come back and they will lose Millions in the process[.]" Reed then texted, "Everybody committed to the strike. But just in case some people flake, everyone come in y'all work clothes, so we can meet the 7 am deadline if we get betrayed. We are winning, but I'm hearing rumors of cats being afraid of that dumb ass letter. I'll see you all at 6 sharp." Two employees sent texts encouraging employees to hold firm and not cross the picket line. However, one

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[6] In October 2020, Reed filed a complaint with Michigan's Occupational Safety and Health Administration ("MIOSHA"). On April 28, 2021, MIOSHA issued a report citing Respondent for certain safety violations. The record does not establish whether management was aware Reed filed the complaint, but Reed was carbon-copied on the MIOSHA report notifying Respondent about the violations and the resulting penalties. (GC Exh. 16).

[7] On cross-examination, Parker testified he considered Hamilton's Confederate flag photo inappropriate and offensive, but he repeatedly refused to answer whether he viewed it as "racially" offensive. (Tr. 303-304).

[8] Reed later learned one employee was using a company cellphone, but at no time was this raised by Respondent.

[9] The parties agreed to redact the employees' names and telephone numbers, except for Haashiim and Reed, to protect their identities. The employees are instead identified by numbers.

employee responded, "If and when I decide to come to work that's my business[--]loyalty starts at home." Haashiim responded, "[T]hat's cool, but you all who might go in to work also have a duty to your coworkers just give them a heads-up so they can make a decision…don't leave us hanging just communicate it to us if anyone decides to cross the line …" Reed then texted, "No [sense] in going at each other fellas. We'll see what the numbers look like in the morning. Let's meet at 5:45 a.m., so we can hash this out one way or another before 7 a.m." (GC Exh. 10).

After work on the evening of April 28, this same group of employees participated in another private group text on their personal cellphones. (GC Exh. 6). One of the employees texted, "Thought they was replacing us." He followed this with two smiling face emojis. Reed responded, "I guess the replacements haven't arrived yet. I take it that they don't have Amazon prime. Lol. Fuck outta hear [sic.]." Haashiim responded to Reed's text with six laughing face emojis. He then texted, "Yo BTW to everyone who stayed on strike we standing tall. But its 1 thing it's a handful of us who dedicate our 8 hrs to strike. I dont even have to be out there cus im on medical but i still come. Dan lives over an hour away and he still shows up every day. its not fair for some of you not to come." (GC Exh. 6).

Reed then sent the group a text with a graphics integrated format ("GIF") image of Daffy Duck tap dancing on a stage wearing a yellow straw hat, red bow tie, and white gloves.[10] Reed typed below the image, "I beez at work tomorrow Thom. I beez a good boy for the company. Dem fools out front is crazy. Youz treats me right boss." (GC Exh. 3).[11] A copy of the GIF and text is attached as Appendix A.

One employee responded to Reed's GIF and text with three laughing/crying face emojis. Another employee "laughed at" the quoted language in Reed's text. Another employee posted a GIF of several Caucasian sailors dancing and saluting with the caption below that read, "They fell right in line."[12] Another employee responded, "The objective is to get everyone satisfied and back to work this ain't it fellas." Another employee responded, "This ain't it. Who is this?" The employee responded with his name. And the employee who asked the question replied, "Ok." (GC Exh. 6).

[10] The GIF can be viewed at https://tenor.com/view/tap-dance-dance-daffy-duck-talent-tap-gif-6206564.

[11] Respondent called Dr. Cheryl Thompson as an expert witness to testify about Reed's text. Dr. Thompson is an Assistant Professor at Ryerson University in Toronto who has written and taught on black minstrelsy and racial symbols in the media. Ultimately, she concluded Reed's text was "objectively racist" because it depicted Daffy Duck as a servile "Uncle Tom" character "shucking and jiving" and using broken English on stage trying to please a white audience. She further concluded it was likely sent to "shame" the African American employees not believed to be "acting right" regarding the strike. (Tr. 382-384). Dr. Thompson provided her opinion without reviewing any of the other text messages in the chain, and she acknowledged that without knowing the full context, it was possible Reed could have been encouraging solidarity among the striking employees. (Tr. 393).

Reed denied the text had anything to do with race. He chose the GIF because he recalled that Looney Toons characters would start tap dancing when they wanted to impress somebody. He testified the reference to "Thom" was to Hamilton, not a minstrel "Uncle Tom" character, and he used broken English to convey it would be idiotic or foolish for employees to believe the company's threat about replacing them if they did not return to work. (Tr. 59-60).

Overall, I conclude Reed fully intended for his text to have racial overtones. He is informed and keenly sensitive to racial stereotypes. That being said, I find the text is open to different, equally reasonable interpretations. It could be interpreted as using offensive images and language to shame employees into not selling out their coworkers by crossing the picket line, or it could be interpreted as mocking the belief that striking employees---most of whom are African American---would subjugate themselves to save their jobs and/or to please their employer.

[12] The GIF, which is from the 2016 movie *Hail, Caesar!,* can be viewed at https://tenor.com/view/sailor-channing-tatum-salute-appear-hop-gif-5452863.

G. Reed's Termination

One of the employees on the group text later showed Reed's Daffy Duck text to Operations Manager Hamilton. (Tr. 316). According to Hamilton, the employee, who is African American, reported that "he was being harassed and did not feel safe." (Tr. 317).[13] The employee told Hamilton he wanted to remain anonymous out of concern that he might be retaliated against. Hamilton could not recall if the employee showed him any of the text messages that preceded or followed the Daffy Duck text, but Hamilton did not ask to see them. (Tr. 333). He also did not talk to Reed or any of the other recipients of the text.

Hamilton showed the text to Brooks who found it offensive. Hamilton also contacted Parker to show him the text and to relay what the employee had reported to him. Parker found the text violated the company's policies against racially offensive or harassing behavior, and he made the decision to terminate Reed after consulting with local management. Parker did not interview or get a written statement from the complaining employee because he wanted to respect the employee's desire to remain anonymous; he did not inquire about or review any of the other text messages on the chain; and he did not speak to or obtain a statement from Reed or any of the others on the text chain because he did not feel it was necessary. He determined he had all the information he needed, including the context, who the text came from, where it came from, and the date and time it was sent. (Tr. 254-255).[14]

On April 30, Parker sent Reed a letter terminating his employment for sending a racially offensive text message to multiple employees. Parker included a copy of the Daffy Duck text stating that it violated multiple company policies against racially offensive or harassing behavior, and that an employee who engages in such conduct is subject to immediate discharge. (GC Exh. 7).[15]

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[13] The employee who complained to Hamilton about the text was not called to testify, and he was never identified on the record or to the other parties. The only evidence about what this employee allegedly said was Hamilton's testimony. In general, I found that Hamilton appeared to lack the testimonial demeanor of a witness who is forthcoming and honestly concerned with giving a detailed and accurate account of events. He was, at times, non-responsive, vague, or inconsistent. For example, on direct examination by Respondent's counsel, Hamilton was asked if the employee explained why he did not feel safe. Hamilton answered, "Well, in our duties, you rely on other guys quite a bit. So he --- if something happened." Hamilton then was asked what the employee's reaction was to Reed's text, and he replied simply "very offended." (Tr. 317). On cross examination, Hamilton was asked what the employee stated about Reed's text that made him feel harassed or unsafe, and Hamilton stated he could not recall. (Tr. 325). Later, when Hamilton was asked whether the employee indicated that it was Reed's text that made him concerned about his safety crossing the picket line, or just the general circumstances of the strike going on, Hamilton responded it was the general circumstances. (Tr. 332). I credit this latter response as being candid and accurate.

[14] Respondent has terminated one other employee for violating its policy against racially offensive or harassing behavior. Ted Kalski, who is Caucasian, was discharged in June 2020 for a comment he made while waiting in a company vehicle with two other employees, one of whom was Nate Huitt, who is African American. Huitt questioned what they should do next so they would not get disciplined for wasting company time while waiting to start a project. Kalski stated, "Hey Nate, just go ahead and say it." Huitt asked what he meant. Kalski replied, "Go ahead and say I can't breathe! This company has its foot on my neck!" (R. Exh. 25). This comment was in obvious reference to, and made less than a month after, the videoed murder of George Floyd by a Minneapolis police officer who knelt on Floyd's neck and back for 9 minutes and 29 seconds. Floyd's dying words were, "I can't breathe." Respondent obtained witness statements from the three employees involved in the incident, including Kalski, before making the decision to discharge. Reed later filed a grievance on Kalski's behalf over his discharge.

[15] Three months after his discharge, in July, Reed was looking at the personal Facebook page of another unit employee, Joshua Smith, and saw that Smith had posted a photo from the 1999 prison-break comedy movie "Life" starring Eddie Murphy and Martin Lawrence. The photo was of an African American prisoner that was overseeing the other prisoners while holding a shotgun. Smith, who is Hispanic, wrote a caption to the photo stating "Blk ppl get a lil promotion at work n turn into this nigga." Smith then tagged another unit employee, Lorenzo Miller, who is African American, and wrote "hey boss" with two laughing/crying face emojis. (GC Exh.14). Reed emailed Parker a copy of Smith's

Reed later sent a private group text to the same group of striking employees to inform them he had been discharged because the company found the text to be racially offensive. (GC Exh. 10). Some of the employees expressed disbelief and others began questioning who had shown the text to management. Reed responded that it did not matter who showed management the text because it changed nothing; he told them they should all remain focused on the goal, and he still planned on joining them on the picket line the following Monday. (GC Exh. 10).

Reed later prepared a grievance over his discharge. (GC Exh. 8). On May 12, there was a meeting with representatives from Respondent and the Union, including Reed. Respondent's attorney James Parks commented that Reed's text "was the most racist and vile thing that he's ever seen, and that there was no way that [Reed] was going to return back to the company." (Tr. 66). Reed stated his texts had nothing to do with race. Parks dismissed that claim, telling Reed he knew what he was doing with this "Uncle Tom stuff." That same day, Parker sent Reed an e-mail indicating that while Respondent did not have an obligation to meet with him as the terms of the collective bargaining agreement were no longer controlling, it did so as a courtesy. He also said Respondent had not changed its decision to discharge him. (GC Exh. 9). The Union did not pursue the grievance any further.

H. Haashiim's Leave of Absence and Permanent Replacement

At the start of the COVID-19 pandemic, Respondent allowed its employees to take a personal (unpaid) leave, for up to 90 days, if they did not feel safe working. Haashiim took this leave beginning in March 2020. (R Exh. 13). In June, he informed management he was concerned about returning to work because he suffered from asthma and believed working in confined spaces while wearing a mask may increase his chances of having a serious asthma attack (R Exh. 15). Haashiim later applied for and was granted 12 weeks of leave under the Family and Medical Leave Act ("FMLA"), starting June 17. (R Exh. 16). At the time, Respondent sent Haashiim a letter stating that in accordance with IPR's policy if he failed to return to work within three (3) days after expiration of his FMLA leave, he will be considered to have abandoned his job. (R. Exh 15, pg. 6).

On September 23, IPR human resources generalist, Brittany Woods, sent Haashiim a letter informing him that his FMLA leave had expired, and he had three options: (1) return to work, (2) request an extended leave due to an inability to work because of his medical condition, or (3) resign due to his inability to return to work. (GC Exh. 19). Woods also wrote that if she did not hear from Haashiim by October 12, she would assume that he had abandoned his position and his employment would be terminated.

For the next several months, Haashiim exchanged emails with Woods and other members of IPR's human resources department about requesting an extended leave. (GC Exh. 21). Woods provided Haashiim with the necessary paperwork to have completed by his doctor to justify his need for extended leave.

On October 12, Haashiim emailed Woods requesting a letter from human resources stating he was still employed by the company. (GC Exh. 20). On October 13, Woods provided the requested letter. On

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Facebook post complaining about how offensive it was, particularly the use of the N word to describe black people. Parker investigated the matter, including talking with Smith and Miller. On August 4, Parker sent Smith a letter stating that he understood that Smith and Miller are close friends, that Smith's message was unrelated to work, and neither of them viewed the message as a form of racial harassment. Nevertheless, Parker reminded Smith of IPR's social media policy and that something he may consider to be funny to a friend may be offensive to others, and that he should be respectful of others' feelings in any online posting. (R. Exh. 21). Parker testified he did not ask Smith whether he was referring to a specific supervisor in his text. (Tr. 306).

October 15, Haashiim emailed Woods stating his doctor did not have the forms that needed to be completed in order for him to apply for extended leave. Woods emailed Haashiim and his doctor the paperwork.

On November 12, Respondent provided the Union with the weekly work assignment schedule. It continued to list Haashiim's status as on FMLA. (GC Exh. 17).

On November 23, Haashiim emailed Woods that he had not heard from her since she sent the paperwork to his doctor. (GC Exh. 21). That day, IPR benefits manager L. Renee Harris emailed Haashiim that she was the new benefits manager and would be assisting him moving forward. She stated that human resources spoke with his doctor's office twice about completing the necessary paperwork, but the company had received nothing back. She then asked Haashiim if he was able to provide his doctor with the paperwork directly. On November 30, Haashiim emailed Harris that he was told the previous human resources representative was going to send the paperwork to his doctor. On December 1, Harris emailed Haashiim that Woods had tried unsuccessfully to help, but it ultimately was his responsibility to get those forms completed and submitted.

On December 2, Harris informed Haashiim that she wanted to discuss with him his need to file for short-term disability benefits, which should have run concurrent with his FMLA leave. (GC Exh. 21). He then would have filed for long-term disability benefits once his short-term benefits were exhausted. On December 7, Harris sent Haashiim an email, attaching the short-term and long-term disability claim forms to complete and return as soon as possible. Woods noted that Haashiim should complete his sections of the forms and return them, and the insurer, Blue Cross Blue Shield ("BCBS") could then contact his doctor to request that he provide the necessary information. On December 8, Haashiim informed Harris that he completed the short-term disability claim form, which Respondent later received.

On January 6, 2021, Harris emailed Haashiim telling him to provide the insurer with his doctor's contact information. (GC Exh. 21). She also stated that now that he was "on claim" working with BCBS, human resources would not be following up with his doctor. On February 22, Haashiim emailed Brittany Woods and asked if there was any update on his disability claim. Woods forwarded his email to Harris for her to answer his questions. The record does not reflect that Haashiim received any further information from human resources. He never received anything extending his leave of absence or terminating his employment. (Tr. 163-164; 190).

In response to an early January 2021 inquiry from the Michigan Unemployment Insurance Agency about Haashiim's current employment status for benefit eligibility, an unidentified representative of Respondent checked that Haashiim was currently employed and wrote he was receiving short-term disability benefits. (GC Exh. 27). Additionally, Respondent's Team Roster as of April 12, 2021 listed Haashiim as an employee. (GC Exh. 26).

On April 25, Haashiim began participating in the picket line outside the front gates to Respondent's facility. The Union provided Respondent with a list of the employees participating in the strike, which included Haashiim. According to Parker, it was not until Respondent received this list and compared it to the company's own records that it discovered Haashiim was still listed as an employee, even though he had not returned to work after his leave expired. (Tr. 309-311). On April 26, Haashiim received the same letter as all the other striking employees stating that he would be replaced if he did not report for work the following day at the 7 a.m. start time.

On April 30, BCBS sent Haashiim a letter indicating that it had received his claim for short-term disability benefits and was starting its review. (GC Exh. 23). BCBS requested that Haashiim provide additional medical documentation related to his claim for benefits. Haashiim testified he did nothing in

response to receiving this letter other than continuing to contact BCBS to check on the status of his claim. (Tr. 175). At some point, Haashiim was notified by BCBS that his claim for disability benefits was denied. He did not appeal that determination. (Tr. 185-186).

On May 5, Parker issued Haashiim a letter stating: "Consistent with the notice sent to you on April 26, 2021 you have been permanently replaced. Please contact your union representative and arrange to return all company property in your possession, to the guard shack, at the front entrance, no later than Thursday, May 6, 2021." (GC Exh. 22).[16] On an internal Termination Checklist completed on May 5, Respondent indicated Haashiim's termination was involuntary and it was a job replacement. (GC Exh. 25).

DISCUSSION

I. Threat of Discipline or Discharge for Grievance Filing

A. *Allegation*

The General Counsel alleges that on about December 3, 2020, Respondent, through its attorney during a virtual bargaining session, threatened to discipline or discharge employees for filing grievances, in violation of Section 8(a)(1) of the Act. Respondent denies this allegation.

B. *Applicable Law*

Section 8(a)(1) prohibits an employer from interfering with, restraining or coercing employees in the exercise of their Section 7 rights. Section 7 protects an employee's right to file and process grievances, and Section 8(a)(1) makes it an unfair labor practice for an employer to threaten to discipline or discharge employees for doing so, regardless of the merits of the grievances. See *Loredo Packing Co*., 254 NLRB 1, 2 (1981). See also *Swift & Co*., 250 NLRB 1223, 1229 (1980). "The merits of the grievance are a matter for an arbitrator, not a basis for the employer to dole out discipline to employees engaged in protected activity." *Roemer Industries, Inc*., 362 NLRB 828, 835 (2015), enfd. 688 Fed. Appx. 340 (6th Cir. 2017). See also *Caterpillar Tractor Co*., 242 NLRB 523, 530 (1979). The Board assesses the objective tendency of a statement or conduct to interfere with the free exercise of Section 7 rights rather than considering the employer's motive or employees' subjective reactions regarding the statement or conduct. See generally, *Miller Electric Pump and Plumbing*, 334 NLRB 824, 825 (2001). The test is how a reasonable employee would interpret the statement or conduct considering all the surrounding circumstances. *The Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011).

C. *Analysis*

Respondent proposed adding language giving itself discretion to discipline or discharge employees for "levying baseless, malicious or harassing grievances." Fleet Manager/Facility Manager Theo Brooks told the Union's bargaining committee during negotiations that the language was necessary because the grievances the Union was filing were "just totally out of hand." Respondent's attorney James Parks told Reed directly that his "excessive amount of grievances" was "a problem" and to cut down on the "bullshit grievances." Neither Brooks nor Parks provided any explanation, context, or examples of what they were referring to by their statements.[17] Under the circumstances, I conclude the bargaining proposal and these

[16] Of the strikers, Haashiim was one of three who received this letter stating they were being permanently replaced pursuant to the April 26 letter. (Tr. 312-313).

[17] In its answer, Respondent raises the affirmative defense that the allegation has been remedied. For a repudiation to serve as a defense to an unfair labor practice finding it must be timely, unambiguous, specific in nature to the

accompanying statements would reasonably tend to discourage employees from filing contractual grievances, in violation of Section 8(a)(1).

II. Discharge of Reed

A. *Allegation*

The General Counsel next alleges that on about April 30, 2021, Respondent discharged Shinar Reed because he assisted the Union and engaged in concerted activities, and to discourage employees from engaging in those activities, in violation of Section 8(a)(3) and (1) of the Act. Respondent defends that it lawfully discharged Reed because he violated company policies when he sent the racially offensive and harassing text message.

B. *Wright Line Framework and Analysis*

Section 8(a)(3) prohibits an employer from discriminating regarding the hire or tenure of employment or any term or condition of employment. to encourage or discourage membership in any labor organization.[18] When assessing the lawfulness of an adverse employment action that turns on employer motivation, the Board applies the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved by *NLRB v. Transportation Management Corp*., 462 U.S. 393, 395 (1983).[19] To sustain a finding of discrimination, the General Counsel must show that the employee's Section 7 activity was a motivating factor in the employer's decision. The elements that must be established are that: (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the protected activity and the adverse action. *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120, slip op. at 6, 8 (2019). See also *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 1-2 (2020). Proof of discriminatory motivation (animus) can be based on direct or circumstantial evidence, including evidence the employer's stated reasons for the adverse action are pretext. This may include suspicious timing, false or shifting reasons given in defense, failure to adequately investigate alleged misconduct, departures from past

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coercive conduct, and untainted by other unlawful conduct. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). The withdrawal of a prior unlawful act alone does not meet this standard. See *Triple A Maintenance Corp*., 283 NLRB 44, 45 (1987). Absent any further action, I conclude Respondent has failed to remedy the violation.

Respondent raised other affirmative defenses in its answer, but it failed to present evidence or argument to support them. As Respondent seems to have abandoned those remaining defenses, I will not address them further.

[18] A violation of Sec. 8(a)(3) is a derivative violation of Sec. 8(a)(1). *Bemis Co*., 370 NLRB No. 7 fn. 3 (2020).

[19] Prior to 2020, the Board applied various setting-specific standards for evaluating whether an employer discriminated against an employee engaged in protected activity. For example, *Atlantic Steel Co*., 245 NLRB 814 (1979) set forth the framework that applied to employee outbursts toward management in the workplace, *Pier Sixty, LLC*, 362 NLRB 505 (2015) articulated the multi-part test applied to social media posts and conversations among employees in the workplace, and *Clear Pine Moldings, Inc*., 268 NLRB 1044 (1984) established the standard applied to picket-line conduct. In *General Motors, LLC*, 369 NLRB No. 127 (2020), the Board reversed these decisions and held that, regardless of the setting, the appropriate framework is the one set forth in *Wright Line*. Among the reasons, the Board held the setting-specific standards were at odds with an employer's duty to comply with anti-discrimination laws when the employees' conduct involved comments based on race, color, religion, sex, national origin, age, and/or disability.

Counsel for General Counsel now argues *General Motors* should be overturned and the Board should return to the prior standards. She further argues the "totality of the circumstances" test set forth in *Pier Sixty* should be applied in this case to find Reed was unlawfully discharged because his private text outside of work did not lose the protection of the Act. As an administrative law judge, I have no authority to adopt a new standard or return to a prior one. It is left to the Board, at its discretion, to determine whether to reconsider or change legal standards. See *Liberty Bakery Kitchen, Inc*., 366 NLRB No. 19 (2018). I am bound by extant law.

practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employee. See *Shamrock Foods Co*., 366 NLRB No. 117 (2018); *Lucky Cab Co*., 360 NLRB 271, 274-275 (2014); *Medic One, Inc*., 331 NLRB 464, 475 (2000).

If the General Counsel establishes these factors, the burden shifts to the employer to show it would have taken the same action in the absence of the employee's protected activity. *Wright Line*, 251 NLRB at 1089. An employer cannot simply present a legitimate reason for its action; rather, it must persuade by a preponderance of the evidence that the same action would have taken place in the absence of the protected conduct. See *Bruce Packing Co*., 357 NLRB 1084, 1086-1087 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015); *W. F. Bolin Co*., 311 NLRB 1118, 1119 (1993), review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996)). The General Counsel may also offer proof that the employer's reasons for the personnel decision were false or pretextual. If the proffered justification(s) is found pretextual, it must be determined whether the surrounding facts tend to reinforce that inference of unlawful motivation. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019) (quoting *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).[20]

In applying the *Wright Line* framework, I conclude the General Counsel has met her burden. Reed engaged in various statutorily protected activities known to Respondent. He was the chief Union steward and a member of the Union's bargaining committee. He filed numerous grievances and complaints related to unit employees' terms and conditions of employment.[21] Later, following the strike vote, Reed joined fellow unit employees picketing outside Respondent's front gates to protest the company's economic proposals. He also sent the group texts---including the Daffy Duck text---to encourage solidarity among the employees and to discourage them from crossing the picket line in response to Respondent's threat to replace them. See e.g., *Mead Corp*., 314 NLRB 732, 733 (1997), enfd. 73 F.3d 74 (6th Cir. 1996) (messages directed at encouraging solidarity against employer's bargaining tactics and in support of striking employees is protected activity); *Midstate Telephone Corp*., 262 NLRB 1291 (1982) ("employees have a legitimate interest in seeking to promote solidarity among their fellow employees with respect to matters of mutual concern, such as an economic strike, to secure a favorable collective-bargaining agreement …"). The text chain was replete with messages of solidarity among the unit employees.

There also is evidence of unlawful motivation and a causal connection between Reed's protected activities and his discharge. As discussed, Respondent's representatives expressed direct animus towards Reed's grievance filing. Brooks stated that Reed "waste[d] everybody['s] time" by filing grievances that did not allege a violation of the agreement or by pursuing grievances after the matter was resolved or the employee was no longer challenging the discipline. Brooks further stated Respondent's December 2020 bargaining proposal was in direct response to the "totally out of hand" grievance filing that occurred after Reed became steward. Parks echoed these sentiments with his comments to Reed about his "excessive" and "bullshit" grievance filing.

Over the next several months, Reed continued to file grievances and lodge complaints. In the two weeks prior to his discharge, he filed the grievance alleging that Operations Manager Thomas Hamilton was attempting to intimidate him in his role as Union steward by assigning him to work in the shop. At the same time, he sent the text to Human Resources Director Parker, Hamilton, and 10 unit employees

[20] Counsel for General Counsel also argues for the reversal of *Tschiggfrie Properties* and *Electrolux Home Products,* and to restore the *Wright Line* test for determining when an employer's animus toward its employees' protected activities caused an adverse employment action. As stated, those are arguments for the Board to consider. Again, I am bound to apply the law as it currently stands.

[21] Reed also reported health and safety issues to MIOSHA, but the record does not establish management was aware of his involvement. The same is true of Reed's statements during the April 25 Union meeting encouraging employees to vote down Respondent's contract offer and vote in favor of going out on strike.

complaining about Hamilton's Confederate flag post on his personal Facebook page. As part of this complaint, Reed asked Parker to tell Hamilton to stop using offensive or racist terms when referring to African Americans. A week later, Reed sent the texts mocking Respondent generally, and Hamilton specifically, for threatening to replace the striking employees if they did not demonstrate obedience and return to work. A day later, Respondent discharged Reed. The timing of Reed's discharge in relation to his protected activities further establishes animus and causation. *Smyrna Ready Mix Concrete, LLC*, 371 NLRB No. 73, slip op. at 3 (2022). See e.g., *McClendon Electrical Services*, 340 NLRB 613, 613 fn. 6 (2003) (discharge a day after protected activity supported a finding of unlawful motivation); *Cell Agr. Mfg. Co*., 211 NRLB 1228, 1232 (1993) (lay-offs 48 hours after protected activity proved animus); *Corn Brothers, Inc*., 262 NLRB 320, 325 (1982) (discharge within a week of activity is evidence of animus).

Also, Respondent has offered shifting defenses/explanations for why it discharged Reed, which evinces animus and pretext. See *BS&B Safety Systems, LLC*, 370 NLRB No. 90, slip op. at 1 (2021) (shifting defenses or explanations are evidence of pretext); *MCPc Inc*., 367 NLRB No. 137, slip op. at 4 (2019); *Lucky Cab Co*., 360 NLRB at 274. As discussed, Parker's April 30 letter stated Reed was terminated for sending a racially offensive message *to multiple IWPC employees*, in violation of the company's policies against racially offensive or harassing behavior. In its post-hearing brief, Respondent now contends it discharged Reed because he "chose to target and humiliate" *an* African American employee who had crossed the picket line by circulating the text at issue with "derogatory and offensive slurs." Respondent contends Reed's "comments and racialized depiction of a servile African-American cartoon character directly placed another employee in a state of fear and anxiety about their own physical safety."

Not only is this a new and different defense/explanation for the discharge, but it is without any evidentiary support, which further bolsters a finding of pretext. Nothing in the text or surrounding circumstances objectively suggests Reed was targeting or threatening any unit employee. The text itself was clearly sent to a group of 18 unit employees. The only person referenced was "Thom" Hamilton. As explained, I find Reed sent this text to those he believed to be on strike, urging them not to bow to the company's threat and cross the picket line.

Respondent relies on the subjective reaction of one employee who allegedly complained to Hamilton about feeling harassed or unsafe. However, even that evidence does not support Respondent's argument. Hamilton was asked what about Reed's text made the employee feel harassed or unsafe, and Hamilton could not recall. Later when Hamilton was asked if the employee indicated whether it was Reed's text that made the employee concerned for his safety crossing the picket line or just the general circumstances of the strike, Hamilton responded it was the general circumstances of the strike.

Thus, neither the objective or subjective evidence supports that Reed was targeting or threatening any employee with his text, and certainly not based on their race.

Animus and pretext also are demonstrated by Respondent's disparate treatment of others alleged to have engaged in racially offensive or harassing behavior. *Mondelez Global*, supra slip op. at 4 (cases cited therein)(disparate treatment is evidence of pretext). As discussed, Respondent issued Gerry Schiewech, a Caucasian supervisor, a "disciplinary action" after he threatened to "hang" a subordinate African American employee if he failed to perform his job properly. Even if this statement was metaphorical, it was far more a direct threat and likely to induce fear and anxiety for physical safety than anything in Reed's text.

Additionally, Respondent also took no disciplinary action against Josh Smith, a Hispanic employee, after he tagged an African American coworker on a Facebook post of an African American man in a prison uniform holding a shot gun with the caption, "Blk ppl get a lil promotion at work n turn into this nigga." Respondent argues Smith's post was unrelated to work and was not sent with any form of racial harassment

towards Miller or any other person, but only in humor between two friends. Parker drew this conclusion without ever asking Smith if he was referring to a supervisor at work. Finally, it appears Respondent took no action against Hamilton for his Confederate flag post or after he asked an African American employee who complained about being overworked if his foreman was acting like a "slave driver."

The only other employee discharged for racially offensive or harassing behavior was Ted Kalski. Kalski, a Caucasian employee, told an African American coworker after he expressed concern that they may be disciplined if they did not begin working on a project, "Go ahead and say 'I can't breathe! The company has its foot on my neck!'" This situation is distinguishable. Kalski directed his comment to a specific employee during work time while in a work vehicle. Moreover, the statement was made a month after George Floyd uttered those words before being murdered by a Caucasian police officer, sparking a national uprising against police brutality and racism.

Finally, animus and pretext are further demonstrated by Respondent's failure to fully investigate Reed's alleged misconduct, which itself is a deviation from its established practice. See *Rood Trucking Co., Inc*., 342 NLRB 895 (2004) (failure to investigate alleged misconduct constitutes strong evidence of pretext); *Golden State Foods*, 340 NLRB 382 (2003) (same). Respondent's established procedure when handling harassment complaints is to conduct a thorough investigation, including interviewing the person reporting the harassment, the person(s) claimed to have engaged in the harassment, and any possible witnesses. In the situations described above, Respondent appears to have followed this procedure. It allowed the accused the opportunity to explain their side or provide a written statement; it considered the context and subjective reactions of those involved; and it gave weight to whether the conduct occurred outside of work and/or on personal devices or social media platforms. Here, management did not take these steps. It did not interview Reed. or any of the other employees involved in the text chain. Nor did management request or review any of the other texts in the chain to fully understand the context of the text at issue. And, as discussed, the information Hamilton gathered from the complaining employee was limited and vague. See generally, *BS&B Safety Systems, LLC*, supra slip op. at 13-14; *Wendt Corp*., 369 NLRB No. 135, slip op. 2, fn. 8 (2020).

Upon the General Counsel establishing Reed's protected activities were a motivating factor in the employer's decision to discharge him, the burden shifts to Respondent to establish it would have taken the same action regardless of his protected activities. Respondent has failed to meet this burden. As explained, Respondent's stated reason is pretext, and all the surrounding facts tend to reinforce that inference of unlawful motivation. Even if it were not pretext, Respondent's disparate treatment of those who engaged in comparable conduct belies its claim that it would have taken the same action. The only other individual Respondent discharged was Kalski, and I have found his situation to be clearly distinguishable.

C. *Burnup & Sims Framework & Analysis*

Respondent argues in its post-hearing brief it is not liable for discriminatorily discharging Reed because it had an "honest belief" that he had engaged in misconduct by sending the text. Where the conduct for which an employee is discharged is intertwined with the employee's otherwise protected activity, the employer's motivation is not at issue, and the proper analytical framework is that found in *NLRB v. Burnup & Sims, Inc*., 379 U.S. 21 (1964). Under this framework, an employer may lawfully discharge an employee for engaging in misconduct in the course of his otherwise protected activity, but only if it had a good-faith and correct belief that such misconduct occurred. Id. at 23-24. See also *Aqua-Aston Hospitality, LLC*, 365 NLRB No. 53 (2017).[22]

[22] The *Burnup & Sims* standard survives the Board's decision in *General Motors*. See *General Motors LLC*, supra slip op. at 16 fn. 27.

Under the *Burnup & Sims* framework, the initial burden is on the General Counsel to establish that the employee was disciplined or discharged for conduct occurring during the course of protected activity. *Burnup & Sims*, supra at 23. The burden then shifts to the employer to show that it held an honest, good-faith belief that the employee engaged in serious misconduct. Id. The test for "serious misconduct" is whether the employee's activity is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate coworkers. *Nexstar Broadcasting, Inc*., 370 NLRB No. 68, slip op. at 1 fn. 1 (2021). See also *Fresh & Easy Neighborhood Market, Inc*., 361 NLRB 151, 156 (2014) (employee's Sec. 7 activity does not lose protection merely because it makes fellow employee uncomfortable); *Consolidated Diesel Co*., 332 NLRB 1019, 1020 (2000) ("[l]egitimate managerial concerns to prevent harassment do not justify . . . discipline on the basis of the subjective reactions of others to [employees'] protected activity").

Once the employer establishes that it held an honest belief in the employee's serious misconduct, the burden shifts to the General Counsel to affirmatively show that the misconduct did not in fact occur. See *Akal Security, Inc*., 354 NLRB 122, 124-125 (2009), reaffd. 355 NLRB 584 (2010); see also *Taylor Motors*, 365 NLRB No. 21 (2017). Thus, an employer who discharges an employee for misconduct within the course of protected activity will be found to have violated the Act where the evidence discloses that it did not honestly believe the serious misconduct occurred, or even if it did so believe, it was mistaken. *Aqua-Aston*, supra.

As previously stated, I conclude Reed was engaged in protected activity when he sent his Daffy Duck text trying to encourage solidarity and to discourage unit employees from crossing the picket line and weakening the Union's bargaining position. Respondent contends it had an honest, good-faith belief that Reed engaged in serious misconduct by sending the text because he "targeted and humiliated an African American employee … by using derogatory and offensive slurs … that directly placed the employee in a state of fear and anxiety about their own physical safety." I have already rejected this claim as unsubstantiated pretext. Moreover, a review of the entire text chain---which Respondent chose not to consider as part of its investigation---shows that while Reed was concerned about "betrayal" by those who might cross the picket line, he attempted to maintain unity and civility, as opposed to division and hostility, in his texts to his fellow employees. For example, when the employees began bickering over whether to go forward with picketing after Respondent issued its April 26 letter, Reed stepped in and told the group, "No [sense] in going at each other fellas. We'll see what the numbers look like in the morning." Later, after he was discharged and certain of the group wanted to root out the employee who reported the text to management, Reed again stepped in and told the group that it did not matter who showed management the text and to stay focused on their goal. Respondent's failure to fully investigate shows it was more interested in discharging Reed than in getting to the bottom of whether or not he engaged in serious misconduct. See *Manor Care Health Services - Easton*, 356 NLRB 202, 204 (2010), enfd., 661 F.3d 1139 (D.C. Cir. 2011); *Medic One*, Inc., 331 NLRB at 475 (same). Overall, based on the circumstances, I conclude Respondent did not honestly believe that serious misconduct occurred, and even if it did, it was mistaken.

As a result, regardless of what theory is applied, I find the General Counsel has established that Respondent discriminatorily discharged Reed because of his protected activities, in violation of Section 8(a)(3) and (1).

III. Discharge of Haashiim

A. *Allegation*

The General Counsel also alleges that on May 5, 2021, Respondent discharged Quammar Haashiim because he assisted the Union and engaged in concerted activities, and to discourage employees from engaging in those activities, in violation of Section 8(a)(3) and (1) of the Act. Respondent denies this allegation and argues that Haashiim was terminated because he abandoned his employment.

B. *Analytical Framework & Analysis*

In applying the *Wright Line* framework, I find the General Counsel has met her burden regarding Haashiim's discharge. Haashiim engaged in protected activity beginning on April 26 when he picketed with other unit employees outside Respondent's front gates to protest the company's economic proposals. Respondent was aware of this activity because he was observed by members of management as they entered and exited the front gates. Additionally, Respondent received the Union's letter identifying Haashiim as one of the employees participating in the strike. Animus is established based on the timing of Haashiim's discharge a little over a week after Respondent learned he was on the picket line. Respondent contends Haashiim voluntarily terminated his employment when he failed to return to work in September 2020, but its internal schedules and rosters, including its response to the Michigan Unemployment Insurance Agency, demonstrate it continued to consider Haashiim to be an employee through April 2021, and, from all accounts, that remained true up until Respondent learned he was picketing in support of the strike. Based on this evidence, I conclude Respondent's stated reason for discharge is pretext.

Respondent's May 5 letter to Haashiim further establishes pretext and a causal link between his protected activity and his discharge. The letter states Haashiim was being "permanently replaced" based on the April 26 letter Respondent sent threatening to replace those strikers that did not cease their protected activity and return to work the following day. If Respondent considered Haashiim to have voluntarily abandoned his employment after he failed to return from his leave of absence seven months earlier---which it allegedly first discovered by his participation in the picket line---there is no reason for it to send this letter permanently replacing him. Nor is there any reason for it to list on his termination checklist that his separation was involuntary.

Overall, I conclude the General Counsel has established Respondent's discriminatory motivation, and that if Haashiim had not engaged in the protected picketing in support of the strike, it would not have discharged him. As a result, I find Haashiim was discharged in violation of Section 8(a)(3) and (1).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act when it threatened to discipline or discharge employees for filing or pursuing grievances.

3. Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Shinar Reed and Quammar Haashiim.

REMEDY

As a remedy for these unfair labor practices, Respondent is ordered to cease and desist from its unlawful conduct and to take certain affirmative action. Respondent will be required to reinstate Shinar Reed and Quammar Haashiim to their former positions or, if that position no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed, assuming they are medically able and cleared to do so. Respondent shall make each individual whole for any loss of earnings and other benefits suffered as a result of its unlawful termination starting from the date

they establish they were medically able to work.[23] The make-whole remedy for each individual shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc*., 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017). Respondent also will be ordered to compensate these individuals for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent also shall be ordered to compensate each of the individuals for the adverse tax consequences, if any, of receiving a lump sum backpay award. In accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016), Respondent will also be ordered to file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, a report allocating backpay to the appropriate calendar year for each. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In accordance with *Cascades Containerboard Packing-Niagara*, 370 NLRB No. 76 (2021), as modified 371 NLRB No. 25 (2021), Respondent also will be ordered to file with the Regional Director, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, copies of each individual's corresponding W-2 forms reflecting the backpay awards. This section should be read together with the following

ORDER

Respondent, Inland Waters Pollution Control, Inc., its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Threatening to discipline or discharge employees for filing or pursuing grievances, regardless of their merit.

(b) Discharging or otherwise discriminating against employees because they assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer reinstatement and make whole Shinar Reed and Quammar Haashiim for their unlawful discharge; make each whole for reasonable search-for-work and interim employment expenses, plus interest; compensate each for the adverse tax consequences, if any, of receiving a lump-sum backpay award; file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s); file with the Regional Director for Region 7 a copy of corresponding W-2 forms for each reflecting the backpay award; remove from all files any reference

[23] To the extent that the General Counsel requests consequential damages, I deny the request but note that the issue is currently under review by the Board. See *Thryv, Inc*., 371 NLRB No. 37 (2021).

to these unlawful discharges, and within 3 days thereafter, notify each in writing that this has been done and that their discharge will not be used against them in any way.

(b) Compensate Reed and Haashiim for any adverse income tax consequences of receiving a lump-sum backpay award, and file with the Regional Director for Region 7, within 21 days, a report allocating the backpay award to the appropriate calendar years for each employee.

(c) Within 14 days after service by the Region, post at Respondent's Detroit facility the attached notice marked "Appendix B."[24] If the locations involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the locations involved in these proceedings are closed due to the COVID–19 pandemic, the notices must be posted within 14 days after the location reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if Respondent customarily communicates with its employees by electronic means. Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representative, shall be posted by Respondent, and maintained for 60 consecutive days in conspicuous places including all places where notices to employees/members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees/members by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former members of the Union and current and former employees employed by Respondent at any time since December 3, 2020.

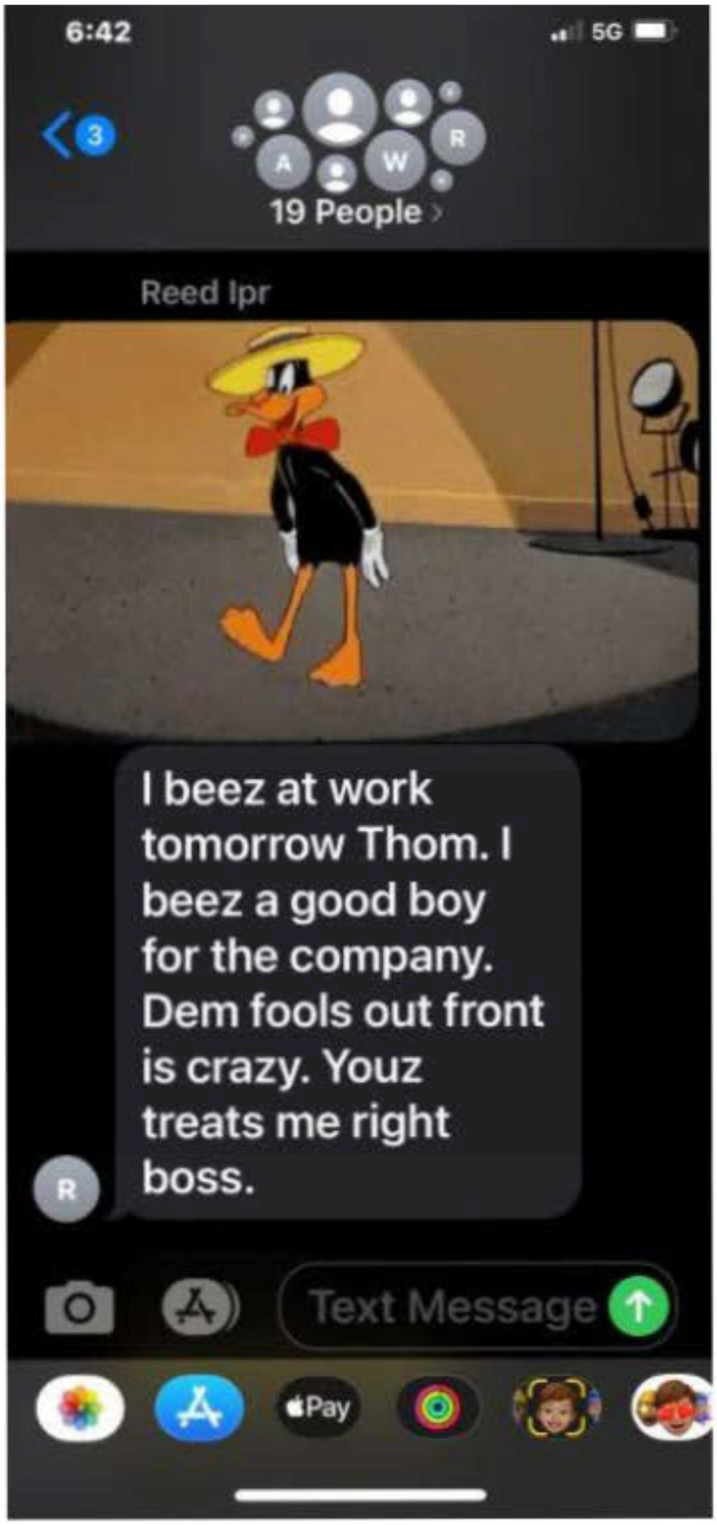
(i) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C., June 24, 2022

Andrew S. Gollin
Administrative Law Judge

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in each of the notices referenced herein reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A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19 People
Reed Ipr
I beez at work tomorrow Thom. I beez a good boy for the company. Dem fools out front is crazy. Youz treats me right boss.
R
Text Message
Pay

APPENDIX B

(To be printed and posted on official Board notice form)

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT threaten to discipline or discharge you for filing or pursuing grievances, regardless of their merit.

WE WILL NOT discharge or otherwise discriminate against you because you assisted the Union and engaged in concerted activities, or to discourage you from engaging in these activities.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act.

WE WILL offer Shinar Reed and Quammar Haashiim full reinstatement to their former jobs or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed, assuming they are medically able and cleared to do so; **WE WILL** make each whole for any loss of earnings and other benefits suffered as a result of our unlawful termination, starting from the date they establish they were medically able to work; **WE WILL** make each whole for reasonable search-for-work and interim employment expenses, plus interest. Compensate each for the adverse tax consequences, if any, of receiving a lump-sum backpay award; **WE WILL** file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s); **WE WILL** file with the Regional Director for Region 7 a copy of corresponding W-2 forms for each reflecting the backpay award; and **WE WILL** remove from our files any reference to these unlawful discharges, and **WE WILL**, within 3 days thereafter, notify each in writing that this has been done and that their discharge will not be used against them in any way.

WE WILL compensate these employees for any adverse income tax consequences of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 7, within 21 days, a report allocating the backpay award to the appropriate calendar years for each employee.

INLAND WATERS POLLUTION CONTROL

(Employer)

Dated: **By:**

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at https://www.federalrelay.us/tty (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-277239 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Centralized Compliance Unit at complianceunit@nlrb.gov